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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT REPLY BRIEF FOR PETITIONERS AMERICAN BROADCASTING COMPANIES, INC., CBS INC., METROMEDIA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL RADIO BROADCASTERS ASSOCIATION, WBNS TV INC. AND RADIOHIO INCORPORATED

The Joint Brief for Respondents largely ignores many of the central issues of this case. It devotes scant attention to the extensive and significant legislative history of the Communications Act bearing on these issues, and to the articulation of the policies of the Act in this Court's decisions in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter *CBS* v. *DNC*], *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *FCC* v. *NCCB*] and *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) [hereinafter *Midwest Video*]. Respondents' attempts to minimize the intrusive nature and significance of the standard imposed by the court below

and to suggest that its decision can somehow be affirmed on an alternative procedural ground are without merit.[1]

I. RESPONDENTS HAVE NOT DEMONSTRATED THAT THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO ENGAGE IN FORMAT REGULATION.

Respondents attempt to characterize the court of appeals' format rulings as "narrow and limited,"[2] and contend that they merely require the Federal Communications Commission (the "Commission") to hold hearings and "consider" changes from unique formats.[3] However, hearings and consideration are required by the court below solely because of the court's underlying determination that the Commission must, under appropriate circumstances, bar particular format changes. As we demonstrated in our opening brief, the format cases thus require the Commission to engage in extensive and intrusive broadcast program regulation, and to reject proposed format changes which do not satisfy the standards imposed by the court of appeals.[4]

To suggest, as respondents do,[5] that this degree of Commission oversight somehow does not involve "regulation" of radio program formats is specious. Nor is it plausible to argue that regulation is not involved because the only sanction for impermissibly altering a format during the license term is denial of a license renewal, *i.e.*, the termination of the enterprise.[6] No exercise in semantics can conceal the fact that the court of appeals required the Commission, in effect, to dictate a licensee's program schedule by forcing it to retain a format where the broadcaster has concluded, on the basis of its own programming judgment, that a new or altered format would better serve the audience. There is nothing either "narrow" or "limited" about this requirement.[7] Nor is this requirement supportable under the Communications Act.

A. The Commission, and Not the Court of Appeals, Has Primary Responsibility for Determining the Public Interest.

Remarkably, respondents contend that no deference need be accorded by the court of appeals to the Commission's view of what is required by the "public interest" standard[8] of the Communications Act.[9] None of the cases cited by respondents involved a construction of the public interest standard under the Communications Act or under any other statute.[10] Indeed, as we discussed in

[1] The opinion of the court of appeals, *WNCN Listeners Guild* v. *FCC*, is reported at 610 F.2d 838; the opinions of the Federal Communications Commission, *Changes in the Entertainment Format of Broadcast Stations*, are reported at 60 F.C.C.2d 858 (1976) and 66 F.C.C.2d 78 (1977). References to the Joint Appendix in the court of appeals will be cited herein as "C.A.J.A. ——." References to the Appendix to the Government's petition for writ of certiorari will be cited herein as "FCC App. ——." References to the Joint Appendix in this Court will be cited herein as "Jt. App. ——."

[2] Joint Brief for Respondents WNCN Listeners Guild *et al.* (WNCN *et al.* Brief) at 39.

[3] *Id.* at 19 n.38, 63. *See also id.* at 1, 35.

[4] *See* Joint Brief for Petitioners American Broadcasting Companies, Inc. *et al.* (ABC *et al.* Brief) at 27-28, 56-57.

[5] *See* WNCN *et al.* Brief at 72 n.177.

[6] *Id. See also id.* at 58. Of course, where a change of format is proposed in an assignment application, the sanction is denial of the proposed assignment.

[7] Respondents have failed to suggest how the court of appeals' format rulings can be confined to the license renewal and assignment contexts. We demonstrated in our opening brief that the logic of the format decisions might lead the court to compel the Commission to engage in even more intrusive program content regulation. *See* ABC *et al.* Brief at 28.

[8] *See* 47 U.S.C. §§ 307(d), 309(a), 310(d). *See* ABC *et al.* Brief at 26.

[9] WNCN *et al.* Brief at 32.

[10] Respondents place extensive and rather puzzling reliance on two irrelevant cases. *See id.* at 10-12, 32-33, 54, citing *Ashbacker*

our opening brief, the legislative history of the Communications Act makes clear that the Commission, and not the court of appeals, is charged with initially defining what is encompassed by the public interest standard.[11] Respondents do not even advert to this important legislative history, nor are they apparently willing to accept the decisions of this Court which have made equally clear that Congress delegated to the Commission authority for the "weighing of policies under the 'public interest' standard." [12]

B. The Commission Is Not Required To Adopt Every Regulation Which Might Arguably Promote Program Diversity.

Respondents further claim that the decision below is "nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of

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Radio Corp. v. *FCC*, 326 U.S. 327 (1945), and *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) [hereinafter *UCC*]. These cases held that listeners have standing to seek denial of a license renewal where the licensee has failed to comply with Commission rules and point out that licenses may not be issued without comparative hearings if relevant issues of fact are contested and there are competing applications. But these propositions are not in issue here. Unlike the court of appeals' decision here, in neither *UCC* nor *Ashbacker* did the reviewing court dictate the substantive standards the Commission was to apply in making its public interest determination, and this Court in *Ashbacker* emphasized that it was "not concerned . . . with the merits. This [case] involves only a matter of procedure." 326 U.S. at 333 (foonote omitted).

[11] *See* ABC *et al.* Brief at 29-32.

[12] *FCC* v. *NCCB*, 436 U.S. at 810. *See also National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943). *See also* Brief for the Federal Communications Commission, *et al.* (FCC Brief) at 33-34.

1934." [13] The respondents apparently find a precision in the public interest standard which has heretofore escaped notice by this Court, the Commission and commentators in the field.[14] Their theory evidently is that since program "diversity" is in the public interest, Commission regulation of radio program formats to promote such diversity is necessarily required.[15]

In administering the Communications Act, the Commission confronts a variety of possible regulatory alternatives. The Act clearly does not require that the Commission elect to engage in every type of program regulation that could conceivably advance diversity or that might be consistent with the First Amendment, just as it does not require the Commission to adopt every ownership regulation that might be viewed as promoting diversity. This Court in *FCC* v. *NCCB* found nothing "in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances." [16]

As we pointed out in our opening brief,[17] the policies of the Communications Act and the First Amendment strongly confirm the Commission's decision to refrain from regulating radio formats. While particular respondents or amici may regard formats which emphasize symphonic music, opera, or jazz as being more in the

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[13] WNCN *et al.* Brief at 29.

[14] *See, e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *Inquiry and Proposed Rule Making: Deregulation of Radio*, 73 F.C.C.2d 457, 479-81 (1979); D. CILLMOR & J. BARRON, MASS COMMUNICATIONS LAW 764 (3d ed. 1979).

[15] *See, e.g.*, WNCN *et al.* Brief at 57-58.

[16] 436 U.S. at 810 (footnote omitted). *See* ABC *et al.* Brief at 40.

[17] ABC *et al.* Brief at 41-50, 54-72.

public interest than other formats, it is not the Commission's function to select from among the available types of programming on the basis of subjective judgments as to whether a particular format better serves the public interest than some other format.[18] The suggestion in the opposing briefs that the Commission concern itself with such matters reflects a fundamental misapprehension of the Commission's role under the Communications Act, a serious misreading of the history of the Act, and an apparent ignorance of the role which the Commission and its predecessor, the Federal Radio Commission, have played since 1927.

The view of respondents and amici is that Commission selection of "diverse" formats is necessary in order to confine the role of "private broadcasters" in the selection of programming.[19] Respondents' belittling of the role of broadcast licensees, however, is entirely inconsistent with the statutory scheme which makes clear that broadcasters are to enjoy wide latitude in the choice of programming.[20] In *CBS* v. *DNC*, this Court confirmed that in

[18] *See id.* at 41-50, 54-59.

[19] *See* WNCN *et al.* Brief at 62. Respondents also claim that advertisers unduly influence the selection of radio programming and that it is necessary for the Commission to insure the broadcast of programming which is not advertiser supported. *See id.* at 62, 79 n.197, 91 n.233. Whatever the merits of that concern, it hardly justifies Commission dictation of program formats. The belief that there was a need for non-advertiser supported programming was the very consideration that led to government funding of public broadcasting. *See* 47 U.S.C. §§ 390-394; H.R. REP. NO. 1178, 95th Cong., 2d Sess. 4 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5345, 5348; H.R. REP. NO. 572, 90th Cong., 1st Sess. 3 (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1772, 1801. As a result, various cultural tastes—including those favoring classical music—are served by public radio as well as by commercial stations.

[20] *See* ABC *et al.* Brief at 41-43. *See also* FCC Brief at 20-27.

enacting the 1927 Radio Act, "Congress appears to have concluded . . . that of [the] two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." 412 U.S. at 105. That principle was recently reaffirmed by this Court in *Midwest Video*, 440 U.S. at 705: "the policy of the Act [is] to preserve editorial control of programming in the licensee."

Moreover, as shown in our opening brief, the legislative history of the Act indicates that Congress specifically rejected proposals to authorize the Commission, in licensing individual stations, to prescribe the broadcaster's choice among alternative program subject matters.[21] Respondents devote little attention to this significant legislative history, arguing that it is "essentially irrelevant to the narrow issue presented in this case."[22] In essence, they attempt to distinguish the regulation rejected in the 1920's from format regulation by suggesting that "all that the legislative history cited by all petitioners shows is that Congress did not intend an *allocations* scheme based on program categories."[23]

Respondents' view is unsupportable. Congress was not merely concerned that the Commission might allocate channels to particular subject matters, but was apprehensive that the Commission, in choosing among competing applicants, would establish priorities based upon the subject matter of the applicants' proposed programming. The legislative history is replete with statements of con-

[21] ABC *et al.* Brief at 43-50.

[22] WNCN *et al.* Brief at 72.

[23] *Id.* (footnote omitted; emphasis in original). "Allocation" is a term apparently used by respondents to denote the reservation of a particular channel for a particular service (*e.g.*, FM radio or VHF television) as opposed to the process of granting to individual applicants licenses to use specific frequencies.

cern about such comparative consideration.[24] Specific statutory language which would have empowered the Commission to "prescribe . . . the priorities as to subject matter to be observed by . . . each station within any class . . ." was ultimately rejected.[25] Thus, the view that the Commission should "prescribe" the broadcaster's choice of program subject matter "in determining who shall and who shall not receive licenses and renewals" did not prevail.[26] This is precisely the type of regulation which the court of appeals here has ordered the Commission to undertake.

Respondents' suggestion that the Commission, in considering license applications, has in the past considered proposed entertainment program formats is also inaccurate.[27] In performing its licensing function, the Com-

[24] Thus, during the 1926 Congressional hearings on radio regulation, the question was raised whether "the fact they are going to broadcast sacred music—does that have any more effect on getting a license than the fact that you are going to broadcast jazz?" *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926). And at an earlier conference, Congressman Wallace White, later the author of the bill that was the basis for the Radio Act, questioned whether the government, in assigning licenses, should "give a priority" to one type of programming over another, *i.e.*, to religious sermons over prize fight reports, to crop reports over baseball reports, or to sermons over sacred concerts. Minutes of Open Meeting of Dep't of Commerce Conference of Radio Telephony, Feb. 27-28, 1922, at 95-96.

[25] H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924). *See* 66 CONG. REC. 2361 (1925); 68 CONG. REC. 2572 (1927).

[26] *Hearings on H.R. 5589* at 39-40.

[27] *See* WNCN *et al.* Brief at 9-10, 69-71. Respondents make the surprising suggestion that:

> "Clearly, as already discussed, the Commission could not have enacted the chain broadcasting rules nor could it have defended them in this Court if it had accepted the restrictive, but ultimately irrelevant view of the legislative history proposed by petitioners in this case." *Id.* at 73 n.183.

Nothing in the chain broadcasting regulations assigns priorities to programs based on their subject matters. *See* 47 C.F.R. § 73.658 (a)-(h) (1979). Indeed, those rules sought to promote the free choice of programming by local stations. That goal would be undermined by the regulatory regime advocated by respondents.

mission historically has given limited consideration to the overall proposed programming of an applicant for an initial license and to the past programming of an applicant for license renewal. In addition to considering compliance with such requirements as the equal opportunities provisions of Section 315[28] and the fairness doctrine,[29] the Commission has given limited consideration to the overall amounts of news and public affairs programming[30] and to the quantity of local and live programming.[31] The Commission has primarily reviewed the

[28] 47 U.S.C. § 315(a). *See Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 730 (1973).

[29] *See, e.g., Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), *reconsideration denied*, 27 F.C.C.2d 565 (1971), *aff'd sub nom. Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

[30] *See, e.g.*, 47 C.F.R. § 0.281(a)(8) (1979); *AM & FM Program Form*, 1 F.C.C.2d 439 (1965).

[31] *See, e.g.*, 47 C.F.R. § 0.281(a)(8) (1979); *En Banc Programming Report*, 44 F.C.C. 2303, 2314 (1960). In the *Report on Public Service Responsibility of Broadcast Licensees* (1946) (the "Blue Book"), cited by respondents, WNCN *et al.* Brief at 7 n.15, 69, the Commission merely decided to consider the quantity of locally produced, live, public affairs and non-commercial programming presented by broadcasters. It neither dictated the subject matter of the programming nor required adherence to a particular format.

Amici American Symphony Orchestra *et al.* point to the Commission's "meritorious" programming policy for license renewals as demonstrating that program formats have been considered relevant to the Commission's public interest determination. Brief Amicus Curiae of American Symphony Orchestra *et al.* at 16-17. The Commission's policy in this area is merely to consider in miti-

licensee's responsiveness to the problems, needs, and interests of the community as ascertained by the broadcaster on the basis of its own community surveys.[32]

However, the decisions of the court of appeals requiring format regulation go much further and represent a radical departure from traditional standards. As the Commission observed, "[f]or over 40 years . . . broadcast applicants have been free to select their own programming formats." [33] For the Commission to play a more active

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gation of alleged rule violations some of the same types of programming as are deemed relevant to comparative judgments between two competing applicants. But the Commission has not deemed a licensee's choice of a particular format to be relevant in this context.

Moreover, the Commission recently confirmed that its "longstanding [meritorious programming] policy has been to give primary consideration to public service programming . . .," and not to entertainment programming. *Cosmopolitan Broadcasting Corp.*, 75 F.C.C.2d 423, 425 (1980). The Commission, in that case, rejected a meritorious programming claim because the applicant had failed to demonstrate that its entertainment programming contained sufficient "public service 'elements'." *Id.* at 428.

[32] *See Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

[33] *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580, 585 (1975), FCC App. 60a, 72a.

Respondents cite Commission consideration of specialized services in comparative proceedings as evidence that the Commission has routinely granted licenses on the basis of entertainment formats. They also refer to Commission consideration of these program services in determining whether the nighttime allocation rule (47 C.F.R. § 73.37(e)(2) (1979)) should be waived to permit the nighttime operation of a station. WNCN *et al.* Brief at 9, 70-71. Thus, respondents assert that "since the enactment of the Radio Act of 1927, agency decisions and policy have regarded . . . programming format . . . as relevant and material to the public interest." *Id.* at 69.

In fact, none of the cases relied on by respondents involved entertainment formats. Rather, they concerned proposals to broadcast in foreign languages (*e.g.*, *International Radio, Inc.*, 45 P&F

and intrusive role in the selection of programming would be contrary to the Communications Act and, as we now demonstrate, would also be contrary to the First Amendment.

Rad. Reg.2d 173 (1979); *D&E Broadcasting Co.*, 70 F.C.C.2d 646 (1978)), to present programming directed to a minority segment of the community, such as Blacks (*e.g.*, *Salter Broadcasting Co.*, 8 F.C.C.2d 1036 (1967); *Flint Family Radio, Inc.*, 69 F.C.C.2d 38 (Rev. Bd. 1977); *George E. Cameron Jr. Communications*, 71 F.C.C. 2d 460 (1979)), or to broadcast predominantly religious programming (*Ward L. Jones*, 32 Fed. Reg. 1062 (1967); *Flint Family Radio, Inc., supra*).

The Commission and its Review Board have recently indicated that, even for these specialized program services, comparative preferences will rarely be warranted. *Flint Family Radio, Inc., supra; George E. Cameron Jr. Communications, supra.* In *Flint Family Radio*, a member of the Commission's Review Board, while urging that minority and religious programming should result in a comparative preference, observed that:

> "I know of no comparative case involving initial licensing and requiring a determination of relative need for specialized programming, where the entertainment or musical programming proposed by any of the applicants has been considered relevant to an ultimate determination of whether a need for the proposed service exists. . . ." 69 F.C.C.2d at 52 (concurring statement of Member Kessler).

The Commission's policy statement under review, while briefly mentioning foreign language programming, *see* 60 F.C.C.2d at 863, FCC App. 128a; 66 F.C.C.2d at 80, FCC App. 181a, did not specifically address these and other specialized program service categories. A foreign language program service, of course, presents issues very different from those involved here since the decisions the Commission is required to make, if permissible at all, do not involve judgments as to the desirability of particular program subject matters but focus instead on the language of the broadcast. The Commission's policies with respect to specialized religious and ethnic program services are still in the process of evolution. Therefore, this Court need not now decide whether the Commission can or should regulate proposed changes in this area or whether the Commission can or should grant preferences for such specialized programming services.

II. RESPONDENTS HAVE FAILED TO RECOGNIZE THE SUBSTANTIAL FIRST AMENDMENT CONSIDERATIONS THAT STRONGLY SUPPORT THE COMMISSION'S POLICY JUDGMENT.

By emphasizing general principles that are not in serious dispute in this case, respondents have failed to come to grips with the substantial constitutional concerns that guided the Commission in reaching its policy determination. Respondents' approach is exemplified by their introductory assertion that *Red Lion*[34] so definitively disposes of the First Amendment issues that any elaboration is almost superfluous, volunteered by respondents only out of "an excess of caution."[35] It is also illustrated by respondents' highlighting of the "less drastic means" test while either avoiding or minimizing the more basic thrust of our First Amendment argument.[36]

While it may suit respondents' purpose to suggest that petitioners are here effectively requesting that *Red Lion* be overruled, this case presents no such issue and does not require resolution of the Commission's authority with respect to the unique constitutional status of broadcasting. We have shown that the Commission's policy judgment in this case was strongly supported by First Amendment principles specifically applicable to broadcasting.[37]

Despite respondents' suggestions,[38] *Red Lion* is not dispositive here, nor does it grant the Commission unfettered discretion to dictate programming. In fact, the Commission's fairness doctrine, upheld in *Red Lion*, was deemed constitutionally acceptable only because it "contemplates a wide range of licensee discretion." *See Midwest Video*, 440 U.S. at 705 n.14.

[34] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[35] WNCN *et al.* Brief at 74.

[36] While the "less drastic means" test lends further support to the Commission's findings in this case, it plainly did not constitute the major emphasis of our First Amendment argument.

[37] *See* ABC *et al.* Brief at 54-57.

[38] WNCN *et al.* Brief at 74.

The differences between Commission administration of the fairness doctrine and direct regulation of program formats are pronounced. As previously noted,[39] the fairness doctrine requires that when broadcasters present one side of a controversial issue of public importance, they must also present opposing viewpoints. In this respect, the fairness doctrine does not dictate a broadcaster's *initial* choice of programming, restrain the broadcast of speech or control the manner of presentation.[40] Indeed, the Court cautioned in *Red Lion* that government "refusal to permit [a] broadcaster to carry a particular program . . . would raise serious First Amendment issues." 395 U.S. at 396. In contrast, the type of regulation required by the decision below would institute a dramatic new level of intrusiveness, forcing the Commission, in certain circumstances, to dictate a licensee's basic program schedule—*e.g.*, requiring continued adherence to a "classical," "middle-of-the-road," "country and western" or "all-talk" program format—in circumstances where the broadcaster has affirmatively exercised a contrary editorial and artistic judgment.

In essence, the First Amendment arguments of respondents fail to join issue adequately with the findings of the Commission and the arguments of petitioners in this Court. For example, they have not even directly ad-

[39] ABC *et al.* Brief at 56.

[40] In *Red Lion*, the Court noted that the fairness doctrine requires "that discussion of public issues be presented on broadcast stations." 395 U.S. at 369. But the Court also made clear that the selection of particular programs is for the broadcaster. *Id.* at 396.

dressed the Commission's conclusion that program format regulation would necessarily require application of highly subjective and elusive standards—which is a major source of the constitutional difficulties the Commission envisioned.[41] Similarly, respondents merely gloss over the Commission's finding that format regulation would have an adverse chilling effect on the programming judgments of broadcast licensees. Respondents simply assert that no specific evidence of chilling has been documented.[42] Yet they appear to recognize the obvious: "a broadcaster might choose to refrain from making a format change" because such a change "might create a risk of nonrenewal of his license." [43]

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[41] *See* ABC *et al.* Brief at 64-70. As we emphasized in our opening brief, the fact that program formats are composed of highly subjective elements makes it virtually impossible to categorize those formats without intruding impermissibly into matters of taste and editorial judgment. *See id.*

[42] WNCN *et al.* Brief at 88 n.220. Respondents' apparent reliance in this context on *Younger* v. *Harris*, 401 U.S. 37 (1971), is misplaced. In *Younger*, this Court cited established principles of federalism in overturning a federal district court injunction that had halted, without a proper showing of irreparable injury, an ongoing state criminal prosecution. The *Younger* court merely observed that any chilling effect occasioned by a state criminal statute would not automatically render that law unconstitutional if it could be shown that the "effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Id.* at 51 (citations omitted). Respondents have made no attempt to demonstrate that this *Younger* test is applicable to the facts of this case or that it is satisfied here. On the contrary, as we have shown, the effect on speech in this case is by no means minor (ABC *et al.* Brief at 62); the Commission has correctly determined that attempts to "control" broadcasters' program format "conduct" involve grave and unwarranted risks (*id.* at 40-41); and the Commission does not lack alternative means for enhancing program diversity (*id.* at 57-58).

[43] WNCN *et al.* Brief at 68 (footnote omitted).

In our opening brief we discussed some of the more evident manifestations of the chilling effect.[44] It is additionally worth noting, however, that the influence of format regulation on individual licensee decisionmaking may reverberate throughout the industry in ways that are not always obvious and direct. *See, e.g., Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963); *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975) (separate statement of Chief Judge Bazelon). In this general context, respondents' conclusory statement that the numerous pre-hearing settlements of format cases "directly and dramatically demonstrate" [45] the alleged "correctness" of the format decisions is nothing more than an attempt to obscure the essential significance of these settlements—*i.e.*, that they provide compelling evidence that broadcasters are in fact deterred from experimenting with programming concepts by the high cost, delay and uncertainty of Commission proceedings (whether formal or informal, and whether threatened or actual).

In sum, it is difficult to imagine an approach more inimical to the First Amendment and more inconsistent with the governing statutory scheme than a requirement depriving broadcasters of the right to select their basic program format and forcing the Commission to reach subjective judgments, editorial in nature, as to the desirability of particular programs or program formats.

III. THE ALLEGED PROCEDURAL ERROR DOES NOT NOT PROVIDE AN INDEPENDENT GROUND FOR AFFIRMING THE COURT OF APPEALS' DECISION.

Respondents claim that the Commission's alleged improper reliance on a staff study [46] constitutes an addi-

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[44] ABC *et al.* Brief at 62-64. *See* also FCC Brief at 52-56.

[45] WNCN *et al.* Brief at 86.

[46] Respondents consistently refer to this study as "two" studies. The study is reflected in Tables 1, 2 and 3 of the Commission's initial decision. *See* 60 F.C.C.2d at 875-81, FCC App. 164a-70a.

tional basis for affirming the decision below.[47] The court of appeals' decision did not rest on this ground, but on the theory that the public interest standard requires regulation of program formats as a matter of law.[48]

It is equally clear that the issues in this case transcend the proceeding under review. The court of appeals' requirement that the Commission engage in format regulation was the result of sharply divergent views of the Commission's role in defining the public interest standard under the Communications Act, a difference that has been reflected in court of appeals' decisions over the past decade.[49] The alleged errors in the Commission's proceeding would not provide an independent ground for affirming the court of appeals' interpretation of the Act. Neither would additional Commission proceedings further illuminate the fundamental issue of this case—whether the Commission was required by the public interest standard to regulate changes in radio program formats. The court of appeals evidently agreed.[50]

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[47] Respondents also argue that the Commission's decision was "arbitrary and capricious." WNCN *et al.* Brief at 33-43. As we have shown in our opening brief, this contention is without merit. *See* ABC *et al.* Brief at 36.

[48] The court of appeals explicitly stated that it was not relying on the alleged procedural error as a ground for reversing the Commission. 610 F.2d at 847 n.24, FCC App. 17a.

[49] In addition to the decision below, *see Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974); *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970).

[50] As noted in Judge Tamm's dissenting opinion below, the existence of an error in the Commission's proceeding would have warranted, at most, a remand to the Commission to rectify the error. 610 F.2d at 864, FCC App. 54a (Tamm, J., dissenting). *See also South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805-06 (1976); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974).

Moreover, the Commission did not place improper reliance on the staff study which considered the audience ratings and formats of radio stations in the twenty-five largest metropolitan markets. The study consisted of a statistical compilation of format and ratings data derived primarily from two widely available sources.[51] The purpose of the compilation was to determine the extent of format diversity in those markets and to test the Commission's hypothesis that audience satisfaction is not necessarily correlated to format diversity.[52] The study confirmed the Commission's theory and the argument in other parties' submissions[53] that further proliferation of formats would not necessarily increase overall listener satisfaction.[54] The Commission characterized the study only as "bearing out" or "lending further credence" to conclusions which it had reached on the basis of its own long experience, and itself observed that these studies provide "only a rough indication of format diversity in the 25 largest markets."[55]

The results of the staff study—along with a discussion of the data and the methodology employed—were pub-

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[51] BROADCASTING YEARBOOK 1975 and ARBITRON RADIO USA, Spring 1975.

[52] The latter was tested by performing a regression analysis on the relationship between stations' audience shares and their program formats. 60 F.C.C.2d at 874, FCC App. 161a. The statistical compilation in Table 3, *id.* at 881, FCC App. 170a, demonstrated that "audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music . . . as they do for stations programming markedly different types . . . ." *Id.* at 863, FCC App. 129a.

[53] *See, e.g.*, Owen, "Radio Station Format Changes, Diversity, and Consumer Welfare," submitted as Appendix 1 to the Comments of National Association of Broadcasters, Jt. App. 23.

[54] 60 F.C.C.2d at 864, FCC App. 130a.

[55] 60 F.C.C.2d at 863, 874, FCC App. 129a, 160a; 66 F.C.C.2d at 85, FCC App. 190a.

lished on July 30, 1976 as Appendix B to the Commission's initial policy statement. Respondents argue that the Commission could not lawfully rely on the study because it, along with the raw data, were not disclosed before the Commission's initial decision.[56] In essence, respondents claim that they were entitled to discover, to test, and to rebut the accuracy of all material on which the Commission relied. These are the hallmarks of adversarial proceedings, but not of informal rulemaking.

Contrary to respondents' contentions,[57] there is nothing in the Administrative Procedure Act that requires agencies to employ adversarial procedures in rulemakings. Section 553 of the Act, which governs the procedure for informal rulemakings, provides for general public notice of the proceeding and for an opportunity to comment.[58] But Section 553 neither mandates a formal hearing nor entitles parties "to submit rebuttal evidence" as do the provisions prescribing procedures for agency adjudications.[59]

Indeed, respondents' procedural argument appears to ignore this Court's recent holding in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), that Section 553 provides only limited procedural rights and that courts are not

[56] After Citizens Communication Center's FOIA request on August 30, 1976 for the raw data supporting the study, those data were publicly disclosed by the Commission with a more detailed explanation of the staff's methodology. C.A.J.A. 74-87. A so-called computer key identifying the stations was released after reconsideration had been denied. *Id.* at 573-75.

[57] WNCN *et al.* Brief at 50-52.

[58] 5 U.S.C. § 553(b), (c). *See also Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-24 (1978).

[59] *See* 5 U.S.C. §§ 554, 556(d).

free to impose additional procedural requirements.[60] There is no requirement in rulemaking that the Commission compile a complete factual record supporting its decision or that it invite rebuttal on every fact which supports its decision. Recently, in *FCC* v. *NCCB*, this Court recognized that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [61]

Moreover, respondents did have an adequate opportunity to challenge and rebut the Commission's staff study. All criticisms levelled in their brief at the staff's methodology and at the Commission's failure to disclose that methodology could have been made in petitions for reconsideration on the basis of the Commission's description of the study in the *Policy Statement*.[62] Yet none of

[60] It is significant that respondents, in urging that Section 553 embodies a requirement of full disclosure, rely heavily on cases from the District of Columbia Circuit that predate *Vermont Yankee*. WNCN *et al.* Brief at 50-51, citing *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

Interestingly, the Commission here even complied with an earlier District of Columbia Circuit case which recognized that an agency may disclose the information on which it relies "in the final decision so that reconsideration may be sought and judicial review meaningfully afforded." *United States Line, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519, 535 (D.C. Cir. 1978) (construing Section 553 of the Administrative Procedure Act and a statutory "hearing" requirement).

[61] *FCC* v. *NCCB*, 436 U.S. at 814, *quoting FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

[62] The alleged errors do not appear to be substantial; respondents claim that the staff study was flawed because it was limited to the top twenty-five markets, did not include information for all stations,

the petitions for reconsideration on behalf of respondents or anyone else mentioned these alleged deficiencies in the staff's study. Having failed to raise their objections before the Commission, respondents may not raise them on review.[63]

In sum, the fundamental issues of this case are whether the Commission is required to regulate radio program formats and whether such regulation is consistent with the policies of the Communications Act and the First Amendment. Respondents' contention that the court of appeals' format requirements can be sustained on the basis of alleged deficiencies in the Commission's proceeding is without merit.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

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and failed to disclose the mathematical formula employed. WNCN *et al.* Brief at 49 n.111. Respondents have alleged no other errors in the staff study.

[63] *See* 47 U.S.C. § 405.

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